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ALEXANDER L. STEVAS,

82-417

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

No._____

Palmer G. Holcombe, Petitioner

v

State of Alabama, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Huel M. Love
130 East Street, North
Talladega, Al. 35160

Counsel for Petitioner

August 27, 1982

QUESTIONS PRESENTED

1. Whether Acts of Alabama (1980) No. 80-587 is unconstitutional as violative of the Constitution of the United States because the said act delegates to the prosecuting attorney the inherently judicial function of determining whether the sentencing court is empowered to reduce or suspend the sentence of a defendant convicted under said act.

2. Whether Acts of Alabama (1980) No. 80-587 is unconstitutional as violative of United States Constitutional rights under the Eighth Amendment to be free from cruel and unusual punishment.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

No. _____

Palmer G. Holcombe, Petitioner

vs

The State of Alabama, Respondent

Petition for a Writ of Certiorari
To The United States Court Of Appeals For
The Eleventh Circuit

The petitioner, Palmer G. Holcombe, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Alabama entered in this proceeding through denial of a petition for certiorari and a certificate of final judgment entered on July 2, 1982.

OPINION BELOW

No opinion was written in this case but was affirmed on the basis of Wheat v. State, Ala. Cr. App. MS 7 Div. 884, March 2, 1982, a copy of which appears in the appendix hereto.

JURISDICTION

The Judgment of the Circuit Court of Talladega County was entered on May 25, 1981. Appeal was made therfrom to the Alabama Court of Criminal Appeals. The Alabama Court of Criminal Appeals affirmed the judgment of the lower court on March 2, 1982. An application for rehearing was overruled April 20, 1982. A petition for writ of certiorari was denied by the Supreme Court of the State of Alabama and a final certificate of judgement was entered thereto on July 2, 1982. This petition to the Supreme Court of the United States was filed within 60 days of that date. This Court's jurisdiction is invoked under U.S.C. §1254.

QUESTIONS PRESENTED

1. Whether Acts of Alabama (1980) No. 80-587 is unconstitutional as violative of the Constitution of the United States because the said act delegates to the prosecuting attorney the inherently judicial function of determining whether the sentencing court is empowered to reduce or suspend the sentence of a defendant convicted under said act.

2. Whether Acts of Alabama (1980) No. 80-587 is unconstitutional as violative of United States Constitutional rights under the Eighth Amendment to be free from cruel and unusual punishment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States of America
Article I
Article II
Article III
Eighth Amendment
Acts of Alabama (1980), No. 80-587

STATEMENT OF THE CASE

Petitioner was indicted by the Talladega County Grand Jury for violation of Acts of Alabama (1980) No. 80-587. (Trafficking in Cannabis). At arraignment he entered a plea of not guilty. Appellant also filed a demurrer and motion to strike the indictment asserting that the Act was unconstitutional.

At trial, the evidence presented by the State tended to prove the material averments of the indictment, and the jury returned a verdict of guilty on May 25, 1981, assessing a fine of $25,000.00.

Petitioner was sentenced to imprisonment for nine years and was fined in accordance with the verdict. Appellant's application for probation was denied, at which time the Circuit Court remarked that the application was overruled unter the mandatory sentence provisions of the Trafficking law.

The petitioner appealed to the Alabama Court of Criminal Appeals. The Alabama Court of Criminal Appeals affirmed the judgment on March 2, 1982. An application for rehearing was filed on March 25, 1982, and was overruled on April 20, 1982. The Court of Criminal Appeals did not write a decision in this case. The Court's decision was as follows to wit: March 2, 1982. Affirmed on authority of Wheatt v State, Ala. Cr. App. (MS 7 Div. 884, March 2, 1982). All the judges concur. A copy of the Court of Criminal Appeals opinion in the Wheatt v State is attached to this petition.

REASONS FOR GRANTING THE WRIT

1. The decision below justifies the grant of certiorari in that it holds that Acts of Alabama (1980) No. 80-587 is valid and not violative of the United States Constitution. This act delegates to the prosecuting attorney the inherently judicial function of determining whether the sentencing court is empowered to reduce or suspend the sentence of a defendant convicted under this statute (See Alabama Code 1975, Section 20-2-81, sub section (a) and (b)). Under said statute the sentencing Court is without the power or jurisdiction to suspend a sentence or grant probation to a defendant convicted, unless the District Attorney so moves. This powerlessness under said statute to

suspend a sentence or grant probation to a convicted defendant unless the district attorney so moves is invalid as violating the doctrine of separation of powers as implied in the Constitution of the United States, Articles I, II, and III.

It is not to be doubted that the legislature can by general laws control eligibility for probation, parole and term imprisonment. What the legislature is not allowed to do by the doctrine of separation of powers, is what has been done in this statute, ie.e abort the judicial process by subjecting a judge to the control of the District Attorney. See People v. Sidener, 58 Cal. 2nd 645. The power to grant or deny probation is undeniably important in the performance of the judiciary, but under this statute the courts need license from the executive branch to carry out its judicial function.

Considered from the perspective of the doctrine of separation of powers, the District Attorney is not of the Courts and should not be allowed to determine whether a defendant's sentence is to be suspended or probation is to be granted. The effect of this statute is to violate the separation of powers implied in the U. S. Constitution, by taking a power that belongs to the Judicial branch of the government and giving it to the executive branch. The Supreme Court of the State of Alabama in the opinion below reasoned that since the Statute did not wrest from the courts the final discretion to impose sentences that there was no infringement on the constitutional division of responsibilities.

What the Alabama Supreme Court does not adequately consider is that this statute gives to the prosecutor discretion to either allow or disallow the suspension of sentence and the granting of probation to a defendant whom he had prosecuted criminally in the same court. Such discretion on the part of the prosecutor does no less than frustrate and violate the purpose of the judicial process. See People v. Novarro 7 Cal. 3rd 248 Such unbridled discretion in criminal justice violates the doctrine of separation of powers in that "probation is the ultimate and sole responsibility of the trial judge -- The lonely seat of decision belongs to no one but the trial judge."
Ross V. State 312 So. 2nd 60-61 (1975).

Giving the trial judge the final authority to impose a reduced

sentence or to suspend sentence only if the prosecutor recommends such does not preserve the necessary separation of powers between the judiciary and the executive. It is only too plain that some of the judges power of sentencing has been wrested from him by this statute and given to the prosecutor. Esteybar v The Municipal Court for the Long Beach Judicial District of Los Angeles County, 485 P.2nd 1150, (1971), and the People v The Superior Court of San Mater County, Lawrence on Tai Ho, Real Party in Interest 113 Cal. Reptr. 21, 520 P. 2nd 404 (1974).

The Above stated violation of separation of powers by the statute justifies the grant of certiorari to review the judgment and opinion of the Supreme Court of the State of Alabama below.

2. The Decision below justifies the grant of certiorari in that it holds that acts of Alabama (1980), No. 80-587 is valid and not violative of United States Constitutional rights under the Eighth Amendment to be free from cruel and unusual punishment.

The mandatory mininum of three year period of incarceration imposed by said act is prohibited by the Constitution of the United States, Amendment VIII. When the Legislature of the State of Alabama enacted this statute it imposed upon anyone convicted thereunder confinement for at least three years without regard to any of the acknowledged goals of the correctional system such as rehabilitation. The imposition of at least three years of imprisonment for the possession or sale of any quanity of marijuana in excess of 2.2 pounds but less that 2000 pounds does not take into consideration the normal and customary considerations in sentencing convicted persons such as the enormity and severity of the offense, deterrence of crime, and rehabilitative prospects of the offender. See People v Lorentzen, 194 N.W. 2nd 827 (1972).

Under this statue, probation must be denied by the sentencing judge. Such disallowance does not permit the judge to fully exercise his duty to impose a proper sentence by considering all the mitigating end aggravating circumstances involved in the crime. Williams v Oklahoma 79, S. Ct. 737. U.S. v Dawson 576 F. 2nd 656, Ross v State 312 So 2nd 61. Having been sentenced

under this statute, defendants sentence was not individualized. His sentence was contrary to the goal and principle of reformation and rehabilitation.

Under the sentence that was rigidly required to be imposed by the statute the Alabama Board of Pardon and Paroles is not allowed to consider the defendant's character, attitude, performance or rehabilitation in prison as factors toward parole or early release before at least three years of imprisonment has elapsed. This portion of the statute which precludes parole for three years violated defendant's right to be free from the imposition of cruel or unusual punishment. Smothers v State 579 P. 2nd 1062, 1064.

The requirement of a mandatory minimum sentence of three years imprisonment, constitutes cruel and unusual punishment under the United States Constitution, Eighth Amendment since it is unnecessairly severe and disporportional to the nature of the crime. This unnecessary severity and disporportionality is readily discerned when one reflects on the fact that the punishment accorded hereunder is similar to that accorded violent criminals. Defendant convicted of even the most serious offenses other than habitual offenders and capital murders, are eligible for consideration for parole, good time, and incentive good time which under the laws of Alabama can reduce the prospect of confinment to less that three years when as little as a ten year sentence is imposed. See Code of Alabama, 1975, Sections 13A-5-9 and 13A-5-30 et. seq. violation of United States Constitution, Eightn Amendment right to be free from cruel and unusual punishment is especially apparent when one considers that the same minimum sentence is imposed for mere constructive possession of 2.2 pounds of marijuana as for any actual sale of 1999 pounds. Such sentencing is grossly disporportionate to the severity of the crime. Said statute does not differentiate on reasonable grounds between serious and minor offense and does not prescribe proportionate penalities for each.

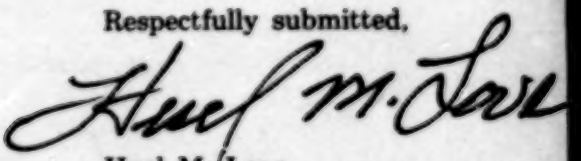
Defendant contends that his punishment, which is devoid of the possibility of probation and even of parole before the elapse of three years in incarceration, is grossly disproportionate to the nature of the crime of which he was convicted and as such

violated his eighth amendment right to be free from the infliction of cruel and unusual punishment.

The above stated reasons justify the grant of certiorari to review the judgment below.

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of the State of Alabama.

Respectfully submitted,



Huel M. Love
130 East Street
Talladega, AL 35160

Counsel for Petitioner